UniQue Personnel Consultants, Inc. *and* Ana Orozco
Case 25–CA–132398

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 28, 2015, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, among other things, that the Respondent violated Section 8(a)(1) of the Act by discharging employee Ana Orozco for engaging in protected concerted activity. The judge found that Orozco was discharged after seeking advice from a fellow employee about how to respond to the discipline she received for violating the Respondent's dress code, which Orozco believed was being applied unfairly and inconsistently. The judge found that this activity was protected and that Orozco was discharged for it. As explained below, we agree with the judge.[4]

Facts

The Respondent operates a staffing company with several branches in Illinois. The Respondent maintains a detailed dress code for its employees. The dress code prohibits certain types of clothing and the display of body piercing and tattoos while at work.

In August 2012, Orozco began working for the Respondent as a temporary administrative assistant at its Galesburg, Illinois office. In December, 2012, she became a permanent employee. Although she was initially told that her facial piercings were not problematic, in January or February 2013, Supervisor Danielle Mason instructed Orozco to remove her piercings while she was at work, and on several occasions thereafter Managing Consultant Melissa McFadden told her to remove her piercings. In addition, Orozco was verbally counseled about wearing jeans in the workplace.

On March 14, 2013, Orozco arrived at the office wearing a jogging suit, having just undergone a medical procedure. Although she intended to change into appropriate attire upon her arrival, her tasks required immediate attention and she did not have an opportunity to change into work attire. McFadden told her that wearing the jogging suit violated the dress code policy, and instructed

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to include the standard remedial language for the violations found, and shall substitute a new notice to conform to the language in the Order as modified. We shall also modify the judge's recommended tax compensation and Social Security reporting remedy, and the corresponding provisions of the Order and notice, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate employee Ana Orozco for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, our dissenting colleague would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

[4] The judge also found that the Respondent violated Sec. 8(a)(1) of the Act by interrogating Orozco about that protected concerted activity, instructing her not to discuss her terms and conditions of employment with her coworkers, and threatening her with legal prosecution if she engaged in further protected concerted activity. We adopt those findings for the reasons stated by the judge.

The Respondent contends that it was denied due process because the complaint alleged that the interrogation was conducted by supervising consultant Elyce Rehmke, but the judge found an unlawful interrogation by managing consultant Melinda McFadden. We find no merit in the Respondent's contention, as the violation found is closely connected to the subject matter of the complaint allegation and was fully litigated. *Pergament United States*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Both the complaint allegation and the violation found concerned the same incident, and it is undisputed that both Rehmke and McFadden were present during the meeting where the questioning occurred. The relevant facts concerning this incident were fully litigated at the hearing. Further, the Respondent does not claim it would have presented any additional evidence or argued the case differently had the allegation referred to McFadden asking the questions rather than Rehmke. Accordingly, the judge's finding did not deny the Respondent due process. In adopting the judge's finding, however, we do not rely on her citation to *Temecula Mechanical, Inc.*, 358 NLRB 1181 (2012).

her to go home. She received a written discipline for this dress code violation on March 18, 2013.

Around April 2014,[5] Orozco began to believe that her supervisors, McFadden and Rehmke, were being overly critical of her. Orozco and fellow employee Anna Castro discussed Orozco's displeasure with the Respondent's dress code policy and the written warning she had received in March 2013. Orozco told Castro that she believed she was being unfairly singled out for violating the dress code.

On May 29, the Respondent emailed its employees about a golfing event it was sponsoring on June 2. The email set forth a dress requirement for the event that, in relevant part, required female employees to wear collared shirts provided by the Respondent and pants or non-denim shorts that were not "too short." Orozco attended the golfing event wearing the Respondent's collared shirt and capri pants. Orozco observed that two other female employees wore capri pants, and that Rehmke wore khaki shorts. The following day, Rehmke issued Orozco a written final warning for violating the dress code policy. The warning stated: "Professional dress is required both in the office and in public when representing UniQue." Orozco noted on her written warning that she disagreed with the warning because she believed there was not "anything wrong" with the pants she wore, as they were not denim.

On June 3, Orozco complained to Castro and another coworker, Emily Collins, about the discipline she received. On June 11, Orozco again spoke about the matter with a third employee, Jasper Smith, as they walked to the parking lot at the end of the day. Orozco asked Smith if she could get his advice about a confidential matter. Smith said yes, and Orozco told Smith about her written warning for a dress code violation and explained why she believed it was unfair. Orozco told Smith that she was contemplating bringing the matter to the attention of higher management at an upcoming company picnic. Smith responded that Orozco should not worry about it and let the matter go**.** Orozco responded, "okay," and the conversation ended.[6]

About a week later, Smith informed the Respondent's human resources department of his conversation with Orozco, and complained that Orozco had been disrupting his work. On June 26, Human Resources Manager Chantelle Gregg contacted McFadden about Smith's conversation with Orozco. McFadden and Rehmke then decided to discharge Orozco.

On June 27, McFadden and Rehmke met Orozco as she entered the office and directed her to a conference room at the rear of the office. After locking the front door of the office to ensure privacy, Rehmke handed Orozco a letter informing her that she was being discharged and explaining the reasons.[7] McFadden then asked Orozco about her June 11 conversation with Smith. Orozco initially asked her what she was talking about. After McFadden repeated the question a few times, Orozco admitted to speaking with Smith about the written warning and about the idea of complaining to higher management. McFadden replied that Orozco had placed Smith in a "bad spot." Both McFadden and Rehmke told Orozco that she should have instead come to them if she had an issue. McFadden then instructed Orozco to collect her personal items and leave the office.

The Judge's Decision

The judge found that the Respondent violated Section 8(a)(1) by discharging Orozco for her protected concerted activity. Applying the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), the judge found that Orozco engaged in protected concerted activity when she discussed with her coworkers the discipline she received and the unfairness of the dress code policy. Citing *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014), where the Board found that an employee engaged in concerted activity by asking coworkers for signatures on a document to be used in support of her sexual harassment claim, the judge stated that an employee who asks for help from coworkers in addressing an issue with management acts for the purpose of mutual aid and protection, even when the issue appears to most immediately benefit the soliciting employee and therefore does not make explicit the employees' mutuality of interests. The judge found that Orozco engaged in such conduct when she asked Smith for advice about how to deal with the unfairness of the discipline she received for the dress code violations. The judge further found that the Respondent had knowledge of Orozco's activity, and that the Respondent's actions evinced animus toward that activity. Finally, the judge found that the Respondent failed to show that it would have terminated Orozco in the absence of her protected concerted activity,[8] and ac-

[5] All dates hereafter refer to 2014.

[6] Although the judge did not reference Smith's response to Orozco in this conversation, Orozco's testimony on this point is uncontradicted.

[7] The letter stated that Orozco was discharged for exhibiting unprofessionalism, and referenced "attitude, dress code and negativity to other staff and corporate representatives."

[8] The judge found that the other purported reasons for Orozco's discharge were pretextual. We agree with these findings, for the reasons stated in the judge's decision.

cordingly found that her discharge violated Section 8(a)(1).

On exception, the Respondent maintains that Orozco's conversation with Smith was not protected concerted activity and, therefore, the General Counsel did not sustain his initial burden under *Wright Line*. Contrary to the Respondent and our dissenting colleague, we agree with the judge.[9]

Discussion

Employee conduct is protected under Section 7 of the Act if it is concerted and engaged in for the purpose of mutual aid or protection. "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." *Fresh & Easy*, 361 NLRB No. 12, slip op. at 3 (2014), citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). It is well established that employees need not expressly state their intent to initiate group action and that a concerted objective can be inferred from the circumstances. E.g., *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988), and *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951).

In *Fresh & Easy*, the Board found that an employee engaged in concerted activity by asking three coworkers to assist her in bringing her sexual harassment claim to management, by signing a document she prepared memorializing the incident. The Board found that under *Meyers II* and its progeny, the employee engaged in concerted activity by seeking her coworkers' signatures, even though she did not intend to pursue a joint complaint. *Fresh & Easy*, slip op. at 3–4. The Board further found that the employee's activity was for the purpose of mutual aid or protection, even though the employee alone was the target of the harassment that was the subject of the claim. Among other authorities, the Board cited Judge Learned Hand's decision in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942), where he stated as follows:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

We find that the conduct at issue here is concerted. Like the conduct in *Fresh & Easy*, Orozco sought to enlist the assistance of her coworker, Smith, with a matter concerning terms and conditions of employment. The assistance sought was advice about how to respond to the Respondent's enforcement of its dress code, which Orozco believed was disparately applied. "Even without more, under *Meyers II* [supra] and its progeny, [an employee's] conduct in approaching her coworkers to seek their support of her efforts regarding this workplace concern would constitute concerted activity." See id. slip op. at 3–4. Further, the Board has long held that employee discussions in which advice about future action is sought or offered constitute concerted activity. See *Jhirmack Enterprises*, 283 NLRB 609, 614–615 (1987) (employee's response to coworker's inquiry about complaints concerning his job performance, stated for the purpose of encouraging the coworker to take corrective action, "was a fundamental form of concerted activity in aid of a fellow employee and, hence, it was conduct protected by Section 7 of the Act"); *Cadbury Beverages*, 324 NLRB 1213, 1220 (and cited cases) (1997), enfd. 160 F.3d 24 (D.C. Cir. 1998) (employee advice to coworker that she not contact a specific union official for support in obtaining unpaid bonus was protected concerted activity). Moreover, the fact that Smith advised Orozco to let the matter go does not affect our finding, as the concerted nature of an employee's request for assistance does not turn on the solicited employee's response to the request. See *Fresh & Easy*, supra, slip op. at 4.

Our dissenting colleague cites *Daly Park Nursing Home*, 287 NLRB 710, 711 (1987), as supporting a finding that Orozco did not engage in concerted activity. We disagree. *Daly Park* involved an employee's comments to her coworkers that she thought the discharge of another employee was unfair and that it was a shame the employee could not hire a lawyer and fight it. The employee also agreed with another employee's comment that the discharged employee would lose a legal fight against the wealthy employer and expressed her hope that she would at least be able to receive unemployment compensation. Significantly, none of the remarks involved the solicitation or offer of assistance or advice to the discharged employee, nor did they contemplate doing anything

[9] In so doing, we do not rely on her citations to *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063 (2009), or *Fresh & Easy Neighborhood Market*, 358 NLRB 537 (2012). However, we note that *Hoodview Vending Co.*, 359 NLRB 355 (2012), cited by the judge, was reaffirmed by the Board at 362 NLRB No. 81 (2015).

about the discharge.[10] As such, that case is readily distinguishable.[11]

We also agree with the judge that Orozco's concerted activity was for the purpose of mutual aid or protection. Mutual aid or protection focuses on the "*goal* of the concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy*, 361 NLRB No. 12, slip op. at 3 (emphasis in original), quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).[12] In *Fresh & Easy*, the Board stated that

> [A]n employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests.
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> . . .
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> By soliciting assistance from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices.

Id., slip op. at 5, 6; see also *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, supra at 505–506.[13] These principles are no less applicable here. Orozco was seeking a coworker's advice on the best way to address her workplace complaint that the Respondent was discriminatorily and arbitrarily applying its dress code policy—a policy applicable to Orozco's coworkers.[14]

Accordingly, for all these reasons, we adopt the judge's finding that Orozco engaged in protected concerted activity during her conversation with Smith and that the Respondent violated Section 8(a)(1) by discharging Orozco for engaging in that activity.

ORDER

The National Labor Relations Board orders that the Respondent, UniQue Personnel Consultants, Inc., Troy, Illinois, its offices, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with prosecution or legal action for talking to other employees, customers, or the general public regarding their terms and conditions of employment.

(b) Discharging or otherwise discriminating against its employees in retaliation for their protected concerted activities.

(c) Interrogating its employees about their protected concerted activities.

(d) Instructing its employees not to talk to or discuss with other employees, customers, or the general public their terms and conditions of employment.

(e) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Ana Orozco full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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[10] Indeed, the Board has distinguished *Daly Park* from situations, like here, where the discussions among employees over subjects affecting employment are directed toward future action. *Cadbury Beverages*, 324 NLRB 1213, 1220 (and cited cases).

[11] Although apparently acknowledging that *Jhirmack Enterprises* and *Cadbury Beverages* support a finding that Orozco engaged in concerted activity, the dissent suggests that *Daly Park's* discussion of *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964) represents a "separate" line of Board cases with a different standard, one that requires a finding that Orozco did not engage in concerted activity. The dissent's suggestion overlooks the Board's holding in *Daly Park* that the activity at issue was not concerted because, unlike here, none of the employees' comments demonstrated that any of them had "contemplated doing anything about the discharge." *Daly Park*, 287 NLRB at 710. That holding in no way conflicts with the holdings in *Jhirmack* and *Cadbury Beverages*, or our finding here that employee discussions in which advice about future action is sought or offered constitute concerted activity.

[12] The dissent contends that proof of "motivation" is required to find a purpose of "mutual aid or protection." We disagree. As discussed in *Fresh & Easy*, motive is not "relevant to whether activity is for 'mutual aid or protection.'" *Fresh & Easy*, 361 NLRB No. 12, slip op. at 3. In *Fresh & Easy*, the Board observed:

> The motive of the actor in a labor dispute must be distinguished from the purpose for his activity. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees.

Id., quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976).

[13] Relying on former Member Johnson's dissent in *Fresh & Easy*, 361 NLRB No. 12, slip op. at 25–28, the dissent contends that *Peter Cailler Kohler* is inapplicable where an employee seeks support in addressing his/her issue with management. For the reasons set forth in *Fresh & Easy*, id. at 6–8, we disagree with that view.

[14] In support of his contention that Orozco's activity was not for mutual aid or protection, the dissent relies on *Continental Mfg. Corp.*, 155 NLRB 255, 257–258 (1965). Contrary to the dissent, the relevant findings in that case did not speak to mutual aid and protection but rather addressed whether the activity was concerted.

(b) Make Ana Orozco whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Ana Orozco for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Ana Orozco, and within 3 days thereafter notify Ana Orozco in writing that this has been completed and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of the Board's Order, rescind the email and expunge from Ana Orozco's personnel file and any other files maintained by the Respondent the email it issued to its employee, Ana Orozco, threatening her with prosecution by local authorities or legal action for discussing her terms and conditions of employment with other employees, customers, or the general public.

(g) Within 14 days from the date of the Board's Order retract, in writing, the letter it sent on June 27, 2014, to the Knox County State's Attorney's Office and the Galesburg, Illinois Police Department instructing employees to not engage in protected concerted activity or that it would contact the police to stop such protected activity.

(h) Within 14 days after service by the Region, post at its facility in Galesburg, Illinois, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 25 Sub-region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

Contrary to my colleagues, I would reverse the judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by interrogating and discharging employee Ana Orozco. Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In relevant part, Section 7 states that the Act protects "concerted" activity for the "purpose" of "mutual aid or protection." Based on these two provisions, the majority's findings that the Respondent violated the Act turn on whether Orozco engaged in concerted activity for the purpose of mutual aid or protection when she asked a coworker for advice about how she should respond to a disciplinary warning she had received. My colleagues find that Orozco was engaged in concerted activity, even though

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

she did not seek to initiate, induce, or prepare for *group* action. Instead, Orozco sought advice as to what she, and *only* she, should do regarding a matter concerning herself, and *only* herself. But even if one assumes that the record supports a finding that Orozco's activity was concerted, unlike my colleagues and the judge, I believe the record fails to establish that Orozco had the requisite purpose of mutual aid or protection. Accordingly, I respectfully dissent from the majority's findings that Orozco was unlawfully interrogated and discharged in violation of Section 8(a)(1).[1]

Facts

Orozco was employed by the Respondent as an administrative assistant at its Galesburg, Illinois office. At the time of the events at issue here, her immediate supervisor was Elyce Rehmke, and above Rehmke was Melinda McFadden. The Respondent maintains a dress code, which prohibits (among other things) tattoos, body piercings (except for "conservative earrings by female employees"), shorts, dresses, or skirts more than 2 inches above the knee, jeans or denim fabric, and jogging suits. "Dress capris" are acceptable provided they are not "tight to the leg."[2]

Orozco had facial piercings. On at least two occasions, McFadden saw Orozco with the piercings and pointed to them to indicate that Orozco should remove them, which she did. On March 14, 2013, Orozco came to the office after a medical procedure wearing a jogging suit. She intended to change into appropriate attire once she arrived at the office, but the office was busy so she immediately started working instead. A coworker of Orozco's complained to McFadden about Orozco's attire. Orozco explained her situation to McFadden, but McFadden gave Orozco a verbal warning and sent her home for the rest of the day. On March 18, McFadden issued a written warning to Orozco for the March 14 dress code infraction. The written warning referenced prior verbal warnings regarding Orozco's facial piercings.

On June 3, 2014, Orozco received a second and final written warning for an alleged dress code infraction at a company golfing event the previous day. Prior to the June 2 event, the Respondent announced modified dress code requirements for the event. Employees were instructed to wear their company polo shirts, and they were permitted to wear pants or shorts but "nothing too short and NO jean shorts." Orozco wore her company polo shirt and nondenim capris. The next day, Rehmke issued Orozco a second and final warning for wearing capris at the golf outing. Two other employees at the event also wore capris, and one wore sandals that showed her tattoo. Those employees were not disciplined.

Jasper Smith was employed by the Respondent as an IT mobile technician. On June 11, Smith arrived at the Galesburg office as Orozco was preparing to close for the day. Orozco and Smith left the office together. In the parking lot, Orozco asked Smith if she could get some advice, and she asked Smith to keep their conversation confidential. Orozco then told Smith about the written warning she had received for wearing capris at the golf event and said that she thought it was unfair. Orozco told Smith that she planned to complain about the warning to higher management at an upcoming company event. In reply, Smith suggested she let the matter go. Smith did not voice any complaints of his own or otherwise comment on Orozco's concerns.

Smith reported the conversation to the Respondent's human resources department. Smith informed HR that Orozco discussed taking her complaints to higher management and possibly disrupting an upcoming company outing. On June 26, HR forwarded the information Smith provided to McFadden. Later that day, McFadden and Rehmke decided to discharge Orozco.

On June 27, McFadden and Rehmke met with Orozco in the Galesburg office. Rehmke locked the front door of the office, and McFadden handed Orozco a letter stating that she was terminated for "unprofessionalism," consisting of "attitude, dress code and negativity to other staff and corporate representatives." McFadden then asked Orozco what she had said to Smith. Orozco asked McFadden what she was talking about. McFadden repeated the question several more times and Orozco gave the same answer. Finally, McFadden asked Orozco if Orozco had told Smith she was planning on going to higher management with her issues. Orozco conceded that she did speak with Smith, that she told him she was upset about the June 3 written warning, that she told him she was going to complain to higher management, and that she had asked Smith to keep their conversation private. McFadden replied that Orozco had put Smith in a "bad spot." Rehmke told Orozco that Orozco should have discussed any problems with Rehmke or McFadden. McFadden repeated Rehmke's statement and then instructed Orozco to gather her personal items and leave the office. Orozco's termination was effective immediately.

[1] I join my colleagues in adopting the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by instructing Orozco not to discuss her terms and conditions of employment and by threatening Orozco with prosecution or legal action for talking about her terms and conditions of employment.

[2] As the judge helpfully notes for the sartorially challenged among us, including myself, "capris" are close-fitting women's pants that end between the knee and the ankle.

Discussion

As the foregoing factual summary makes clear, Orozco was interrogated about her conversation with Smith, and the Respondent does not challenge the judge's findings that the conversation with Smith was a motivating factor in Orozco's discharge and that the Respondent failed to show it would have discharged Orozco even in the absence of that conversation. The Respondent does, however, except to the judge's finding that when she spoke with Smith, Orozco was engaged in activity protected by Section 7 of the Act. Thus, the issue before the Board is straightforward. If Orozco's conversation with Smith was protected by Section 7, the interrogation and discharge violated Section 8(a)(1) of the Act. If not, the interrogation and discharge may have been unfair, but they were not unlawful under the Act.

As noted previously, NLRA Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," and Section 7 protects employees when they engage in "*concerted* activities for the *purpose* of . . . *mutual* aid or protection" (emphasis added). The Board and the courts have devoted extensive attention to the circumstances that must be satisfied before an employee's actions will be deemed to constitute concerted activity for the purpose of mutual aid or protection, and these issues were discussed at length in my separate opinion in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 11–19 (2014) (Member Miscimarra, concurring in part and dissenting in part).

For an employee to enjoy the protection of Section 7, two elements must be met: the activity he or she engages in must be "concerted," and the activity must have the purpose of "mutual aid or protection." The Board comprehensively reassessed the first of these two elements in a pair of decisions issued in the 1980s: *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*),[3] and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*).[4] In *Meyers II*, among other things, the Board set forth the standard to be applied to determine whether a conversation constitutes concerted activity. In doing so, the Board "embrac[ed] the view of concertedness exemplified by the *Mushroom Transportation* line of cases." Id. at 887. Quoting from *Mushroom Transportation*, a Third Circuit decision, the Board stated:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Id. at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). And in *Daly Park Nursing Home*, 287 NLRB 710 (1987), the Board—once again quoting from *Mushroom Transportation*—further clarified the standard:

> Activity which consists of mere talk must, to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere griping.

Id. 710–711 (quoting *Mushroom Transportation*, 330 F.2d at 685).

Applying the standard set forth in *Mushroom Transportation*, I believe it is clear that Orozco's conversation with Smith would not qualify as concerted activity. Orozco asked Smith for advice concerning what *she* should do about a disciplinary warning she believed was unfair. She told Smith that *she* was planning to raise the issue with higher management at a company event. Orozco did not so much as mention the possibility of involving Smith or any other coworker in her confrontation with management. She did not seek to initiate, induce, or prepare for *group* action of any kind. Rather, the purpose of the conversation was "to advise an individual [Orozco] as to what [s]he could or should do without involving fellow workers or union representation to protect or improve [Orozco's] own status or working position," and therefore, under the *Mushroom Transportation* standard, the conversation was "an individual, not a concerted, activity." *Daly Park Nursing Home*, supra.

However, a separate line of Board cases suggests that the *Mushroom Transportation* standard may not apply here. Under this precedent, the question is not whether Orozco engaged in "mere talk" that does not constitute concerted activity absent evidence that at least one of the speakers was seeking to initiate, induce, or prepare for group action, but rather whether the discussion was concerted activity in and of itself. See, e.g., *Cadbury Beverages*, 324 NLRB 1213, 1220 (1997), enfd. 160 F.3d 24

[3] Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[4] Affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

(D.C. Cir. 1998); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987).[5]

I need not decide, however, which line of precedent applies here because even if one were to assume that Orozco engaged in concerted activity when she spoke with Smith on June 11, it is clear that the conversation did not have *mutual* aid or protection as its purpose. Section 7 states that concerted activities are protected only if undertaken for the "*purpose*" of "collective bargaining or other mutual aid or protection." As explained in my separate opinion in *Fresh & Easy Neighborhood Market*, supra, slip op. at 17-19, the term "purpose" refers to intent, and in cases that turn on intent, motivation must be proven.[6] On its face, Section 7 contemplates a "purpose" that must be shared in some way by the employees involved in the "mutual" aid or protection.[7] The term "mutual" means "entertained, proffered, or exerted by *each* with respect to the other of two or to *each* of the others of a group."[8]

The facts of the instant case do not remotely suggest that the interaction between Orozco and Smith had the "purpose" (i.e., intent) of "mutual aid or protection." Orozco talked about the dress code *as applied to her*, and she told Smith about action she was contemplating in order to bring *her* issue concerning the discipline *she* had received to the attention of higher management. Orozco had no intention of seeking to benefit anybody but herself. Accordingly, Orozco's conversation with Smith—the conversation about which she was interrogated and for which she was discharged—did not have a purpose of mutual aid or protection.[9]

Conclusion

The Board is required to apply the statute that Congress enacted, and we do not have authority "to be a forum in which to rectify all the injustices of the workplace." *Meyers II*, 281 NLRB at 888. The only question

[5] As the D.C. Circuit explained in enforcing the Board's order in *Cadbury Beverages*, the Board adopted the administrative law judge's opinion, which "specifically distinguished the *Daly Park* line of cases"—"establishing the well-settled proposition that mere talk between co-workers is not concerted activity protected by the NLRA"—from "those Board cases establishing the rule that discussion among employees about subjects affecting their employment is, when directed toward future action, protected, concerted activity." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998). Contrary to my colleagues' suggestion, it does not follow from the Board's statement in *Daly Park* that none of the employees' comments demonstrated they had "contemplated doing anything about [their coworker's] discharge" that the activity at issue would have been concerted had an employee's comment demonstrated she contemplated doing something on her own about her own personal issue. 287 NLRB at 710. Rather, the Board specifically noted the lack of evidence, "as called for in *Meyers II*," that "an individual employee sought to initiate or to induce or to prepare for *group* action." Id. (emphasis added). Thus, the Board found that the conversation at issue did not constitute concerted activity, as no "'group action of any kind [was] intended, contemplated, or even referred to.'" Id., quoting *Mushroom Transportation*, supra at 685 (alteration in original).

[6] See *Fresh & Easy*, supra, slip op. at 17 & fn. 61 and cases cited therein.

[7] See, e.g., *Continental Mfg. Corp.*, 155 NLRB 255, 257–258, 261–262 (1965), when a single employee gave the employer a letter complaining about working conditions and stating that "the majority of the other employees" had the same "problem" but were "afraid to speak up." Even though the employee undisputedly worked with a coemployee to investigate issues referenced in the letter, which involved other co-employees as well, the Board found there was "no protected concerted activity" because, among other things, the letter was prepared and signed by the employee "acting alone" without any evidence that "the letter was *intended* to enlist the support of other employees." Id. at 257–258 (emphasis added).

[8] *Webster's Third New International Dictionary of the English Language (1981)* 1493 (emphasis added). See also Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Penn. L. Rev. 1673, 1679–1680 (1989) (commonly accepted meaning of "mutual" is "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared . . . Mutual indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons. . . .").

[9] To find that Orozco's conduct had a purpose of mutual aid or protection, my colleagues rely on the Board majority's decision in *Fresh & Easy*, supra, which applied *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942), to find that an employee acted for the purpose of mutual aid or protection where she solicited her coworkers to sign a piece of paper as witnesses to an offensive message, which would then become part of the employee's report to management. *Peter Cailler* is the source of the "solidarity principle," which my colleagues implicitly apply here as well. But as former Member Johnson explained in his separate opinion in *Fresh & Easy*, the Board majority misapplies that principle when it finds that an employee's mere solicitation of support regarding her individual grievance has a purpose of mutual aid or protection. In *Peter Cailler*, the court used the example of a sympathy strike to define the contours of the solidarity principle:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.

130 F.2d at 505–506. Thus, as Member Johnson pointed out, the solidarity principle applies where employees "*in fact join the individual grievant*"—where, for example, they "go out on strike in his support"—not merely where an individual grievant *solicits* support for his or her individual grievance, as happened in *Fresh & Easy*. 361 NLRB No. 12, slip op. at 26 (Member Johnson's emphasis). See id., slip op. at 17 fn. 58, where I joined Member Johnson's finding that "the majority's application of its 'solidarity principle' [was] based on an unwarranted extension of" *Peter Cailler*. Here, however, the solidarity principle is even less applicable than in *Fresh & Easy*. Orozco did not even solicit Smith's support or ask Smith to take *any* action that would then become part of Orozco's complaint to management. She simply asked Smith for advice.

within our purview here is whether the Respondent violated Section 8(a)(1) of the Act when it interrogated and discharged Orozco. For the reasons set forth above, I believe it did not. As to this issue, therefore, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with prosecution or legal action for talking to other employees, customers, or the general public regarding your terms and conditions of employment.

WE WILL NOT discharge or otherwise discriminate against you in retaliation for your protected concerted activities.

WE WILL NOT interrogate you about your protected concerted activities.

WE WILL NOT instruct you to refrain from talking to or discussing with other employees, customers, or the general public your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Ana Orozco full reinstatement to her former position or, if that position no longer exists, to a substantially similar equivalent position, without prejudice to her seniority or any other rights or privileges enjoyed.

WE WILL make Ana Orozco whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Ana Orozco for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful threats and discharge of Ana Orozco, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful threats and discharge will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind the email and expunge from Ana Orozco's personnel file and any other files maintained by us the email we issued to Ana Orozco threatening her with prosecution by local authorities or legal action for discussing her terms and conditions of employment with other employees customers, or the general public.

WE WILL, within 14 days from the date of the Board's Order, retract, in writing, the letter we sent on June 27, 2014, to the Knox County State's Attorney's Office and the Galesburg, Illinois Police Department instructing employees to not engage in protected concerted activity or that we would contact the police to stop such protected activity.

UNIQUE PERSONNEL CONSULTANTS, INC.

The Board's decision can be found at www.nlrb.gov/case/25–CA–132398 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570, or by calling (202) 273-1940.

Ahavaha Pyrtel, Esq. for the General Counsel.
Andrew G. Toennies, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Peoria, Illinois, on November 20, 2014.[1] The Charging Party, Ana Orozco (Orozco), filed the charge in Case 25–CA–132398 on July 9, 2014.[2] Orozco filed an amended charge in Case 25–CA–132398 on September 11. The Regional Director for Region 25, Sub-Region 33 of the National Labor Relations Board (NLRB/the Board) issued a complaint and notice of hearing on September 29 Unique Personnel Consultants, Inc. (the Respondent) filed a timely answer on October 13 and an amended answer and affirmative defenses on October 31, denying all material allegations in the complaint.

The amended complaint[3] alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) on about June 27 the Respondent discharged Orozco for engaging in concerted protected activities; (2) on about June 27 the Respondent, through Supervising Consultant Elyce Rehmke (Rehmke) interrogated its employees about their concerted activities; (3) on about June 27 the Respondent, through Rehmke, instructed its employees not to talk to other employees about terms and conditions of employment; (4) on about June 27 Respondent, through Area Managing Consultant Melinda McFadden (McFadden), who in writing instructed employees to not discuss their terms and conditions of employment with other employees, customers, prospective customers, or thegeneral public; and (5) on about the Respondent, through McFadden, threatened employees with prosecution by local authorities if they discussed their terms and conditions of employment with other employees, customers, prospective customers, or the general public.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation headquartered in Troy, Illinois, is a full service temporary staffing agency with 17 branches throughout Illinois. During the calendar year ending December 31, 2013, the Respondent in conducting its operations, provided services valued in excess of $50,000 for enterprises within the State of Illinois which are directly engaged in interstate commerce. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation

The Respondent provides staffing for a diverse range of business interests, which includes catering, administrative, and banking fields. However, the majority of its placements are for the manufacturing industry. The Respondent's management hierarchy is owner/president, area manager, managing consultant, supervising consultant, and consultant. Gary Hunsche (Hunsche) is the owner and president of the company. McFadden has been employed by the Respondent for about 5 years with the last 3 years serving as the area manager. She is responsible for managing the branch managers of each location within the region. In June 2013, Rehmke was hired as a consultant, and subsequently was promoted her to her current position, managing consultant. As the managing consultant, Rehmke works closely with hiring associates[5] and interfacing with business clients. She interviews and hires prospective associates, performs drug screens and background checks on them, and supervises internal employees at the Galesburg, Illinois office (Galesburg office).[6] Since May, Rehmke has supervised 3 internal employees in the Galesburg office. The employees are Orozco, Consultant Emily Collins (Collins) and On-Site Supervisor Anna Castro (Castro). During various time throughout her 2-year employment history with the Respondent, Castro worked out of the Galesburg office every Thursday or on alternating Thursdays. Castro's duties include overseeing employees' attendance and work productivity, and recruiting, interviewing, and placing associates with clients. The managing and supervising consultants are also authorized to hire, fire, and discipline employees.[7] Additionally, they are responsible for marketing and selling the Respondent's temporary staffing services to businesses.

During the period at issue, Jasper Smith (Smith) was the IT mobile technician who worked out of the corporate office in

[1] The following are corrections to the errors in the transcript: p. 10, line 13 "Section 8(a)(1)" replaces "Section 81," p. 10, line 14 "concerted" replaces "considered," p. 10, line 21 "concerted" replaces "considered," p. 11, line 3 "concerted" replaces "considered," p. 12, lines 4, 15 "concerted" replaces "considered," p. 127, line 1 "no objection" replaces "on objection," p. 138, line 4 "her" replaces "he," p. 151, line 14 "a" replaces "at," and p. 151, line 18 "is" replaces "it".

[2] All dates are in 2014, unless otherwise indicated.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

[4] At the conclusion of the hearing, I notified the parties that by December 5, the Respondent had to research and notify the counsel for the General Counsel whether GC exhs. 15 and 24 were emails authored by McFadden. If the General Counsel determined that the newly disclosed information was relevant to its case, the counsel for the General Counsel had until December 9 to submit a motion requesting the admittance into evidence of GC Exhs. 15 and 24. By motion dated December 9, the General Counsel moved to admit GC Exhs. 15 and 24 into evidence. The Respondent did not file an objection. Based on a review of the evidence and the General Counsel's motion, I will admit GC Exhs. 15 and 24.

[5] The Respondent identifies workers who are placed with outside clients as "associates" and employees who work directly for Unique Personnel as "internal employees."

[6] The charge at issue primarily involves the Respondent's Galesburg, Illinois branch.

[7] Entry level consultants can hire, fire, and discipline associate employees, but not internal employees.

Troy, Illinois.[8] His frequently travels to the 17 branch offices to perform IT service.

On August 2, 2012, Orozco was hired an administrative assistant for the Galesburg office. Initially she worked in a temporary capacity but was subsequently hired as a permanent full-time employee on December 3, 2012. Danielle Mason (Mason), senior consultant, was her immediate supervisor when she was hired. In approximately May, Rehmke became Orozco's immediate supervisor. Orozco's primary job duties were answering telephone calls, scheduling applicant interviews, updating associates' files, assisting applicants with completing their applications, data entry, and filing. She was the only internal employee who worked in the Galesburg office Monday through Friday from 8 a.m. to 5 p.m. McFadden typically came to the Galesburg office once a week.[9] Since her training period ended, Rehmke has worked from the Galesburg office 3 to 4 days a week, and Collins was there on alternating Thursdays.

B. The Respondent's Dress Code Policy

The Respondent has maintained a personal appearance and attire rule (dress code policy), restricting certain clothing, body piercing, and tattoos while at work. The following were among prohibited attire or displays: tattoos, body piercings except conservative earrings, flip flops, shorts, denim, sundresses, T-shirts, dresses, or skirts more than 2 inches above the knees. The rule continues in part:

> Female employees must wear dresses, skirt and blouse, suits or dress pants (with crease) and blouse. No jeans or denim fabric slacks or skirts are permitted. Conservative scarves and headbands are permitted. Specifically, female employees may not wear jumpsuits, sundresses, culottes, t-shirts, tank tops, tube tops, halters, midriff tops, skorts, bare backs, or sheer or revealing blouses. Dresses, sweaters and blouses may not be low cut and clothing may not be tight or extremely revealing. Skirt or dress length must not be shorter than two inches above the knee. Spandex or stirrup pants are not permitted. Dress capris are acceptable but should not [be] tight to the leg. Dress sandals may be worn but cannot be too casual. Flip flops are not permitted. Summer dresses and dress tops may be worn, but they cannot have spaghetti straps, show bra straps, be low cut, be halter style, nor see through. Skirts should not be extremely short, nor should dresses. (GC Exh. 9.)

When Orozco was initially hired as a temporary employee, she had piercings in her eyebrow, nose, and the area between her nose and lip. At that time, Mason told Orozco that the Respondent had a dress code policy requiring her to wear dress slacks, nice shirts or blouses, and dresses with hemlines no shorter than an inch or two above the knee. In response to her inquiry about the appropriateness of her piercings, Mason told her it would not be problematic. However, in January or February 2013, Mason instructed Orozco to take the piercings out whenever McFadden came to the office. Orozco was provided with a written copy of the dress code policy when she was hired as a permanent employee on December 3, 2012.

C. February or Early March 2013 Dress Code Violation

In February or early March 2013, Orozco slipped on the ice as she was entering the office and ripped her pants. As a result, she went home at lunchtime and changed into the only pair of clean pants she had available, black jeans, and returned to the office. Later the same day, McFadden came to the office and Orozco brought it to Mcfadden's attention that she was wearing jeans and explained the reason for it. McFadden did not respond but rather walked into the back room to deposit her items. Orozco did not receive a verbal or written discipline for this violation of the dress code policy.

On March 14, Orozco came to work about 2-p.m. because she had a medical procedure that morning. After the medical procedure, she came to work wearing a jogging suit with the intention of changing into more appropriate attire once she got to the office. On arriving at work, Orozco noticed that the phone was ringing, Castro was interviewing job applicants and "numerous" people were in the waiting area. Orozco immediately answered the phone and then began to help some of the people with their applications and scheduled them for interviews. At some point during that day, McFadden received a call from Castro complaining that Orozco was wearing an inappropriate outfit. When she arrived at the office, McFadden pointed out to Orozco that she was wearing a jogging outfit in violation of the dress code policy. Orozco explained that because the office was so busy when she arrived that she did not have time to change clothes. McFadden instructed Orozco to go home. This exchange occurred about 3:30 p.m.

About March 18, McFadden met with Orozco to inform her that she was being issued a written discipline for violating the dress code policy on March 14. Again, Orozco explained that because the office was very busy when she arrived at work she immediately began to help out and did not have time to change into her "dress" clothes. (Tr. 44.) Despite her explanation about the outfit, McFadden issued the written discipline and instructed her not to discuss their conversation or the discipline with anyone. McFadden also mentioned that Castro complained to her that Orozco was talking to her too much.

Orozco wore her piercings in the office in violation of the dress code policy. On several occasions McFadden saw her with the piercings and pointed to them, indicating Orozco had to remove them which she did.[10] Orozco also acknowledged that she was verbally counseled about wearing jeans in the

[8] In late summer of 2014, Smith was promoted but without a change in job title. Smith is now authorized to hire, fire, and discipline IT technicians under his supervision.

[9] In response to counsel for the Respondent's question, McFadden's testified that beginning in December 2012 she typically went to the Galesburg office once a week. Orozco, however, testified that McFadden came to the office about once a month. Both appeared to provide credible testimony on this point. Since the General Counsel has the burden of establishing credibility and has failed to do so in this case, I credit McFadden's testimony on this point. Nonetheless, the testimony on this point does not affect the merits of the case.

[10] Orozco admits that on at least 2 occasions McFadden saw her with piercings at work and pointed at her to remove them. McFadden testified that this occurred on several occasions, indicating more than two. I credit Orozco on this point.

workplace. All of these verbal admonishments about her body piercings occurred prior to the March 18, write-up for the dress code violation. (Tr. 117.) On May 30, 2014, Rehmke told Orozco that the shoes she was wearing were not appropriate for the office because they looked like "going out shoes." Orozco did not receive a written warning for this incident. Nevertheless, she informed Rehmke that she disagreed with her characterization of the shoes.

D. Complaints by Castro about Orozco Socializing at Work

Prior to April or May 2013, Castro complained to McFadden on several occasions that Orozco disrupted her ability to do her job when she was at the Galesburg office because she felt Orozco talked incessantly and did not work enough. Castro opined that some of Orozco's conversations were inappropriate for the workplace. Orozco also voiced her displeasure to McFadden about Castro asking her to pull documents and refile them, which Orozco felt could have more easily been emailed to Castro. As a result of the complaints, in April or May 2013, McFadden met with Castro and Orozco to resolve the tension between them. McFadden told Castro and Orozco that she liked their team and wanted them to work towards getting along. After the meeting, Castro felt Orozco's behavior improved "for some time" up until the last few months of Orozco's employment with the Respondent. (Tr. 171–172.) Occasionally, Castro would tell Orozco she had to get work completed so that Orozco would stop talking to her while they worked.[11]

Other employees, including managers, on occasion also socialized in the workplace. During working hours, McFadden sold products (Scentsy and Girl Scout cookies), and sent nonwork-related emails to employees.[12] Castro paid personal bills, ordered drug prescriptions, and held short telephone conversations with her husband while on company time.

E. Orozco's Performance Reviews July 21 and November 20, 2013

During her tenure with the Respondent, Orozco received two performance reviews. At the time she was hired as a full-time permanent employee, Orozco was told about the performance review process, shown a sample of the review, and informed that her first review would take place 3 months after her hire date. The performance review covers sections on customer service, initiative and application, dependability, job knowledge, quantity of work, quality of work, leadership, and attitude. Each of the sections contain several subsections with ratings of either "unsatisfactory," "requires improvement," "meets requirements," "exceeds requirements," or "outstanding." The reviewer also discusses with the employee their past and future goals.

Orozco received performance appraisals on July 21 and November 20. McFadden completed Orozco's first performance appraisal and met with her on July 21 to discuss it. On the performance appraisal, Orozco was rated as "meets requirements" on all sections except she received "requires improvement" in 2 areas. Under "quality of work" subsection "work is neat and well organized," McFadden assessed Orozco a rating of "requires improvement" because she needed to work on keeping her work space neat and organized and do a better job of proofreading her emails and associate notes before sending them. Orozco was also rated "requires improvement" under "leadership" sub-section "sets a good example." (GC Exh. 4.) McFadden noted in the reviewer's comments for this rating that there had been tension between Orozco and Castro and "Ana has been coached on professionalism and dress code and has since improved." Id. In her comments about Orozco's overall performance McFadden wrote in part:[13]

> I do feel that there is some tension between Anna [Castro] and Ana that we are in the process of addressing. The only other issue that I have had is above where coworkers feel that there is to (sic) much socializing and work can't get completed. *It has been brought to my attention as well that whenever I address an issue it is talked about with other co-workers when it should be between Ana and I.* (Emphasis added.)

(GC Exh. 4.) Orozco responded in the comment section of the appraisal that she felt it was a "good review" and she was going to work "smarter and harder." Id.

On November 20, Rehmke completed Orozco's second performance appraisal and met with her to discuss it. Based on the ratings and comments in the appraisal, it is clear that Orozco's work performance had improved. Rehmke rated Orozco "meets requirements" in most of the sub-sections and in several sub-section categories she was rated at "exceeds requirements." (GC Exh. 25.) Rehmke included a litany of compliments in the performance review about Orozco's "top-notch" customer service skills, eagerness to assist coworkers with their work, ability to successfully multi-task, great job suggesting applicants for positions, improved organizational skills, improved proofreading of emails, high regard coworkers and associates have

[11] McFadden testified that in May or June a decision was made to reconfigure the office to restrict Orozco's socializing in the office. The administrative assistant's work area was moved further away from the consultant's interviewing area and chairs were also removed from the administrative assistant's area. I do not find her testimony credible. The record establishes that the office was reconfigured after Orozco was terminated. McFadden admitted that the office purchased new furniture had nothing to do with Orozco's socializing. There is also evidence that the Respondent hired a new consultant which required that space be made to accommodate her working in the office.

[12] McFadden admitted selling Scentsy products and Girl Scout cookies but denied selling them during work hours. While I do not credit her testimony on this point, it is immaterial to the merits of the case. The Respondent does not contend that any of its actions were taken against Orozco because she sold nonwork-related products during business hours. However, I do not find plausible that McFadden would wait until the office closed to come into work and solicit orders for her products or wait until her days off to promote and deliver her wares.

[13] During her testimony, McFadden gave examples of topics she felt were inappropriate for Orozco to discuss in the workplace. The subjects included shootings that occurred near Orozco's family bar, hangovers, occurrences at Orozco's family bar, associates Orozco knew from their visits to her family bar, and pointing out associates who "had her back." Orozco denied discussing these topics at work. I credit McFadden on this point. There was corroborating testimony from Rehmke and Castro and based on the totality of evidence, I find McFadden a more credible witness on this point than Orozco.

for her, and wonderful attitude. Rehmke ended the review by noting,

> Ana has done a great job in her professionalism and her performance this review period. I am very proud to see the growth that she had made and is continuing to make.

(GC Exh. 25.) Effective November 25, Orozco received a pay increase from $10.58 an hour to $11.06 an hour for "outstanding performance and growth." (GC Exh. 5.) McFadden prepared the pay increase. [14]

F. Friendship Develops Between Castro and Orozco

After the meeting in April or May 2013 that McFadden held with Orozco and Castro to resolve the issues between them, Orozco's and Castor's relationship gradually began to improve. By October 31, a friendship began to develop between them. Castro bought Orozco gifts to commemorate various holidays and Orozco's birthday. She also gave Orozco a gift for each day of administrative professionals week and periodically brought snacks and drinks to the office for her. After work, Castro and Orozco frequently talked on the telephone about personal and professional matters, and visited outside of the office. Although Castro occasionally got frustrated with Orozco talking to her while she tried to complete work, after their meeting with McFadden she did not complain about it again to McFadden.

G. Orozco and Her Deteriorating Relationship With McFadden and Rehmke

About April, Orozco began to feel that McFadden and Rehmke were being overly critical of her work and not taking her suggestions for workplace improvements seriously. She was offended by a trivial comment that Rehmke made about employees brushing their hair, which Orozco inexplicably felt was directed at her personally. Also, Rehmke began to require Orozco to enter applications employment history into the data base, which frustrated Orozco.

Orozco began to discuss her complaints with Castro about the Respondent's dress code policy and her displeasure with the write-up she received for violating the policy. Stacey Wiltermood, an administrative assistant, also mentioned to Castro on several occasions that she had been written-up. [15] During a telephone conversation they held in October 2013, Wiltermood told Castro that she felt some of the write-ups she had received were unfair. However, Wiltermood admitted that several write-ups she had received for violating the attendance policy were valid. McFadden was Wiltermood's immediate supervisor at the time.

H. Incident at Golf Outing on June 2

On June 2, the Respondent was a sponsor for a golf hole at the local Chamber of Commerce golf event. On May 29 Rehmke sent an email to Orozco, Castro, Collins, and Macomb Branch Consultant Jessica Berger (Berger) to explain the plan for working the golf event. They were responsible for staffing the Respondent's sponsored golf hole. In the email she also reminded them of the dress requirement for the golf outing. It read in relevant part,

> Per the flyer: DRESS REQUIREMENTS: collared shirts, no denim, no halter or sting (sic) strapped tops. Please wear your UniQue polo and pants or shorts (nothing too short and NO jean shorts). Remember we are walking advertising for

(GC Exh. 12.) McFadden was copied on the email even though she did not attend the golf outing. Unlike the Respondent's normal dress code requirement, employees working the golf event were allowed to wear shorts that conformed to the above description.

On the day of the golf outing, Orozco first reported to the office because she was not scheduled to work at the event until 2:30pm. She wore her blue UniQue polo shirt and black dress pants to the office. About 2pm. Orozco changed into black, white and grey capris pants.[16] As she was leaving the office for the golf event, Castro commented that Orozco's outfit was "cute." Orozco and Collins rode to the golf event together. Rehmk and Berger were already at the event when Collins and Orozco arrived. All of the women wore the company logo polo shirts. Collins and Berger paired their shirts with capris pants, and Rehmke wore khaki shorts. Berger wore sandals that showed the tattoo on her foot. However, Rehmke testified that she did not notice the tattoo, and the General Counsel did not impeach her testimony on this point. It is unknown what type of footwear the other women wore to the golf event. Orozco worked at the golf outing from about 2:30 to 5 p.m. without anyone commenting on her attire.

I. June 3 Orozco Disciplined For Violating the Respondent's Dress Code

On June 3 Rehmke met with Orozco and issued her a written

[14] Although McFadden testified that she prepared a change of pay for Orozco after the July 21 performance appraisal, the record shows the pay increase, from $10 an hour to $10.58 an hour, was completed May 31 and effective July 8. (GC Exh. 3.)

[15] Orozco claimed Castro agreed with her complaints that she was being unfairly singled out by local management. She testified that Castro also told her that Wiltermood communicated to her that McFadden also treated Wiltermood unfairly. According to Orozco, Castro said McFadden told her she could no longer speak or email Wilterwood. (Tr. 59–61.) Castro denied Orozco's testimony in total on these points. I partially credit Orozco's testimony. Wilterwood, who I find was a credible witness, testified that she felt Castro was a friend and told her about her feelings that she was being treated unfairly by McFadden. There is also evidence that Castro and Orozco became good friends and often spoke about workplace issues. I do not find it plausible that as her friend, Castro would not have voiced sympathetic understanding, regardless of the level of sincerity, when Orozco complained to her about McFadden and Rehmke. I do not, however, credit Orozco's testimony that Castro told her McFadden forbade her from speaking or emailing Wilterwood. It does not have the ring of truth. Moreover, Wilterwood certainly would have mentioned in her testimony that her friend, Castro, no longer spoke to or emailed her.

[16] The General Counsel and the Respondent disagree over whether Orozco's pants are cargo or capris. Cargo pants are defined as loose trousers with a large external pocket on the side of each leg. Capris pants are defined as close-fitting women's pants that end below the knee and calf or above the ankle. See, Merriam-Webster Dictionary. Based on my review of the photograph of the pants, I find that the pants are capris pants.

final warning for violating the dress code policy. (GC Exh. 11.) Rehmke wrote,

> In Ana's last write up from March 14th 2013 it was stated that another write up would be her final. This is her final warning regarding dress code. Additional issues could result in termination. Professional dress is required both in the office and in public when representing UniQue.

(GC Exh. 11.) Orozco notated on the written final warning that she disagreed with it because she did not feel there was "anything wrong" with her pants since they were not jean material.

J. Orozco's Complaints to Coworkers About Her Being Issued Discipline On June 3

On June 3 Orozco spoke on the telephone with Castro and complained to her about the disciplined she received that day. The conversation lasted approximately 2 to 3 minutes.[17] She also told Collins that she received a written warning for wearing capris pants to the golf outing. Their conversation lasted less than a minute.

On June 11 Smith arrived at the Galesburg office between 4:30 and 4:45 p.m. to install new telephones. The task was estimated to take 30 to 45 minutes to complete. Orozco testified that Smith arrived at the office about 4:30 or 4:45 p.m. on June 11. Castro testified that he arrived about 2:30 or 3 p.m. However, it appears through subsequent testimony that Castro confused the dates that she saw Smith in the office talking to Orozco, and that she was most likely not at the office on the date at issue, June 11. I credit Orozco on this point. By her own account, Castro would likely not have been in the office on June 11. Smith had more of a motive to misrepresent the timing of his arrival at the office. He admitted that his wife and young daughter drove with him the approximately 200 miles from Troy, Illinois, to the Galesburg office. He claimed that he left Troy at 9:30 a.m. or 10 a.m. and stopped once for gas. I do not find his testimony credible on this point. First, he claimed he could not specifically remember if his wife traveled with him on the trip. I find it implausible that he could clearly remember the time he arrived at the Galesburg office but could not remember if his wife traveled with him. I also find it difficult to believe that he did not stop for lunch or restroom breaks with his wife and a child traveling with him. Further, I found that many of his responses were evasive and were deliberately nonresponsive answers to the counsel for the General Counsel's questions. One example is his reluctance to admit something as innocuous as the type of vehicle he drove on the day at issue. Consequently, I credit Orozco's testimony that Smith arrived at the Galesburg office on June 11 about 4:30 or 4:45 p.m.

When Smith got to the office Orozco was getting ready to leave for the day. Since Smith was unable to complete the installation by the end of the workday, he got permission from the CEO to stay overnight so he could return the next morning and finish the job. [18] At approximately 5 p.m., Orozco and Smith left the office together and walked to the parking lot. While they were in the parking lot, Orozco asked Smith if he could give her advice about a matter she wanted him to keep confidential. She told him that she had been written up for a dress code violation and thought it was unfair. She pointed out that Rehmke had worn very short dresses but had not been disciplined.[19] Orozco told him she felt it was unfair that she had been issued a written warning for wearing capris pants to the golf event. The conversation lasted about 10 minutes.

Orozco claimed the next day on June 12 Smith commented that the dress Remke wore to work that day was "a little short." She agreed with Smith and then took a photograph of Rehmke in the dress which was about 4 inches above the knees. Smith denied making the statement and told her that he thought Rehmke always looked nice.[20] (GC Exhs.19, 22.) Both witnesses appeared equally credible on this point. The General Counsel has the burden of proving credibility, but failed to do so in this instance. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997). Therefore, I credit Smith's testimony on this point.

Once Smith returned to the corporate office in Troy, Illinois, he spoke with Gregg in human resources about Orozco disrupting his work with her complaints to him about being treated unfairly by management and her threats to disrupt to the upcoming company picnic. This was not his first time complaining to Gregg about Orozco interrupting his work with her socializing.

K. June 27 Respondent Terminates Orozco

On June 26 Gregg contacted McFadden to inform her that Smith had complained to human resources about Orozco talking to him excessively which precluded him from completing his work in a timely manner. The same day McFadden and Rehmke made the decision to terminate Orozco.[21] Consequent-

[17] Orozco claims Castro expressed disbelief about her being disciplined and pointed out that Berger's tattoos were showing through her shoes and Rehmke shorts were really short. However, no evidence was introduced that Castro observed what Berger or Rehmke wore to the golf outing.

[18] Orozco denies talking with Smith for a prolonged period while he was in office. She insists she waited until after hours in the parking lot to talk with him about the written warning she had received. Smith insists otherwise. I credit Orozco's testimony based on my earlier assessment of his veracity, his overall demeanor and the totality of the evidence.

[19] Evidence was also presented that Castro wore jeans to the office in violation of the dress code policy but was not disciplined. (GC Exh. 20.)

[20] My review of the photograph convinces me that Rehmke's dress was about 4 inches or more above her knees.

[21] Later in her testimony McFadden claimed she alone made the decision to terminate Orozco, and Rehmke was only present at the meeting because she was Orozco's immediate supervisor. She contradicts, without explanation, her initial testimony that she and Rehmke together made the decision to terminate Orozco. Consequently, I do not credit

ly, on June 27 they met with Orozco at the conference table in the back room of the Galesburg office. Rehmke locked the front door to the office, at which point Orozco was handed a letter explaining the reasons for her termination. (GC Exh. 6.) The termination letter stated that she had exhibited unprofessionalism consisting of "attitude, dress code and negativity to other staff and corporate representatives." Id. The letter read in part,

> I would ask you to refrain from discussing UniQue's business or any member of our staff in a negative manner that could hinder our business in anyway, this includes discussing UniQue with any of our associates. If we are made aware of any negative comments to community members, customers or prospect (sic) customers we will take legal action.

(GC Exh. 6.) McFadden continued the meeting by asking Orozco about the substance of her conversation with Smith on June 11. Orozco responded several times that she did not know to what McFadden was referring. Finally, McFadden asked her if she had told Smith she was going to complain to Regional Manager Ladd and Gregg about being disciplined. Orozco told her that she was upset about being issued the written warning on June 3 and had discussed it in confidence with Smith. Orozco admitted that she told him she was going to complain to Ladd and Gregg about the discipline she received. McFadden told her that she had placed Smith in a "bad spot" by talking with him. Both McFadden and Rehmke reminded her that if she had an issue with either of them she should have discussed it with them. McFadden ended the meeting by instructing Orozco to gather her personal items and leave the office. Orozco's termination was effective immediately.

L. Management's Warns Orozco Not to Contact Respondent's Staff

By letter dated June 27 McFadden informed Orozco that she was prohibited from contacting "in the form of a phone call, email, social media or in person any office, staff associates or customers of UniQue Personnel Consultants, or any public function to which UniQue staff are present particularly the one at 1255 Monmouth Blvd Galesburg, IL 61401 other than to contact Human Resources regarding any benefits or final pay information." (GC Exh. 7.) Orozco was also notified that a copy of the letter had been forwarded to the Galesburg Police Department and the Knox County State Attorney's Office. Id.

III. DISCUSSION AND ANALYSIS

A. Legal Standard for Protected Concerted Activity

Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3 Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Hoodview Vending Co.*, 359 NLRB 355, 357–361 (2012).

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Corp*., 358 NLRB 37 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra.

B. July 11 Respondent Forbids Orozco from Discussing with Coworkers Terms and Conditions of Employment

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when on June 27 the Respondent, through Rehmke, instructed its employees not to talk to other employees about terms and conditions of employment. Specifically, the General Counsel alleges that Rehmke told Orozco that if she had an issue with either her or McFadden she was to discuss it with them, rather than voicing her complaints about them to other employees. The Respondent did not specifically address this issue in its posthearing brief, except for a generalized argument that Orozco did not engage in concerted activity.

The Board has held that prohibiting employees from discussing terms and conditions of employment, particularly discipline or potential discipline, violates Section 7 of the Act. Employees have a right to discuss discipline with each other because

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her testimony on this point and find that both McFadden and Rehmke made the decision to discharge Orozco. (Tr. p. 29, 235.)

those discussions may induce employees to take collective action. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Waco, Inc*., 273 NLRB 746, 748 (1984). See also *Lafayette Park Hotel*, 326 NLRB 824 at 828 (1998) (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)). It is not relevant whether an employer's prohibition on discussing terms and conditions of employment is a request or order, nor must it contain a direct or specific threat of discipline to be a violation of employees' Section 7 rights. *Franklin Iron & Metal Corp*., 315 NLRB 819, 820 (1994), enfd. 83 F.3d 156 (6th Cir. 1996); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (supervisor's instruction to employees not to discuss their discipline found unlawful restraint of Section 7 rights, even though the instruction contained no explicit threat of a penalty). However, an employer might avoid liability if it can establish that there is a legitimate and substantial justification that outweighs the Section 7 rights of employees. *Verizon Wireless*, 349 NLRB 640, 658–659 (2007); *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001).

It is undisputed that at the meeting with Orozco on June 27 McFadden asked Orozco what she said to Smith and if she told him that she was going to voice her complaint that she had been unfairly disciplined with human resources and upper management at the company picnic. After Orozco reluctantly admitted to the conversation with Smith, Rehmke told her if she had a problem with McFadden to come talk to Rehmke. McFadden reinforced the admonishment by telling her if she has an issue with Rehmke she should discuss it with McFadden. Within minutes of this exchange, McFadden handed Orozco her termination letter and Orozco collected her personal belongings and left the building.

I find that McFadden's and Rehmke's instruction to Orozco on June 27 was clearly a restraint on Orozco's and other employees' Section 7 rights to speak with fellow employees about terms and conditions of employment and interferes with their ability to engage in collective action with fellow workers. The June 27 meeting was not the first time that McFadden had told Orozco she should not discuss their conversations with her coworkers. As previously noted, McFadden remarked in Orozco's performance appraisal that she was displeased that Orozco discussed with coworkers issues that McFadden voiced with her in private.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint paragraph 4(d)(ii).

C. Alleged Interrogation of Orozco

The General Counsel argues that the Respondent, through Rehmke, interrogated its employees about their concerted activities. The General Counsel contends that Rhemke's questions to Orozco during their meeting on June 27, 2014, were coercive, intimidating, and amounted to an unlawful interrogation. The Respondent did not specifically address this issue in its posthearing brief, except for a generalized argument that Orozco did not engage in concerted activity.

I find that the General Counsel has failed to establish that the Respondent, through Rehmke, unlawfully conducted an interrogation of its employees in violation of Section 8(a)(1) of the Act for the reasons discussed below.

The Board considers the totality of the circumstances in deciding whether questioning rises to the level of an unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984). Moreover, the Board has determined that in applying the *Rossmore* test, it is appropriate to consider the factors established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Under the *Bourne* test, the factors to consider are: background of any employer hostility; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the employee's reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, the question to be answered is whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc*., 358 NLRB 1225 (2012).

Although the complaint alleges that Rehmke was responsible for the interrogation that occurred on June 27 the evidence does not support this charge. Neither McFadden nor Rehmke provided any testimony regarding what was said in the meeting. They also did not dispute Orzoco's version of the conversation. Orozco testified that McFadden was the official responsible for questioning her about her conversation with Smith. According to Orozco, the only comment Rehmke made was, "I told you … that if you had a problem to come talk to me or Melinda. If you had a problem with Melinda you'd come talk to me." (Tr. 81.) This falls short of meeting the test for finding that a conversation amounts to an unlawful interrogation.

I find, however, that McFadden's questions to Orozco amounted to unlawful interrogation. The record establishes that on the morning of June 27 McFadden and Rehmke met with Orozco at the conference table in the back room of the Galesburg office. Rehmke locked the front door to the office, presumably for privacy. There is no evidence that prior to the start of the meeting Orozco was told of any legitimate reason for a meeting in which she was asked by McFadden about her conversation with Smith. Although Orozco responded truthfully to McFadden's queries, she did so reluctantly after McFadden repeatedly questioned her about what she told Smith. There is also no evidence that Rehmke or McFadden gave her any assurances that she could speak freely about the substance of her conversation with Smith without reprisal. On the contrary, the meeting ended with McFadden handing Orozco a termination letter.

The evidence establishes that there had been several incidents leading to the June 27 meeting that reveals the Respondent's hostility towards Orozco: the write-up Orozco received for the outfit she wore at the golf event; McFadden noting in Orozco's performance appraisal her repeated displeasure that Orozco discussed their conversations about work issues with other coworkers; and McFadden and Rehmke telling Orozco that she should not share her complaints about them with coworkers. Second, the evidence shows that one of the primary purposes of the June 27 meeting was for McFadden to specifically ask Orozco if she talked to Smith, what she told him, and if she told him she was going to speak to upper management

about being disciplined. Both McFadden and Rehmke were Orozco's superiors in the company's hierarchy, and had authority to discipline or fire her. The evidence establishes that their relationships never progressed to a friendship, but rather remained one of supervisor and employee.

I find that although Rehmke did not question Orozco about her concerted activity in this instance, McFadden's questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 4(d)(i) when on June 27, the Respondent, through its manager, unlawfully interrogated Orozco.

D. June 27 email threatening Orozco with Prosecution

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when McFadden sent Orozco an email instructing her not to discuss terms and conditions of employment with other employees, customers, prospective customers, or the general public; and threatened her with prosecution by local authorities if she discussed her terms and conditions of employment with other employees, customers, prospective customers, or the general public. The Respondent did not specifically address this issue in its posthearing brief, except for a generalized argument that Orozco did not engage in concerted activity.

The Board has held that employees have a right under Section 7 to discuss "discipline or disciplinary investigations involving fellow employees." *Fresh & Easy Neighborhood Market,* 358 NLRB 537 (2012); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658–659 (2007). Similarly, it is unlawful for an employer to threaten legal action against an employee in retaliation for engaging in protected activity. See *Carborundum Resistant Materials Corp*., 286 NLRB 1321 (1987). As noted in the General Counsel's posthearing brief, the Board has upheld a judge's finding that an employer threatening to file harassment charges against an employee for engaging in protected and union activity violates the Act. *River Falls Healthcare*, 2014 WL 4090575 (NLRB Aug 19, 2014).

The evidence is undisputed that McFadden sent Orozco an email threatening her with prosecution by local authorities if she contacted "any of the Respondent's offices, staff, associates or customers for any reason." I find that the language in the email is so broadly worded that it would chill employees in the exercise of their protected activities. Orozco could reasonably interpret the email as a prohibition against contacting any of the Respondent's offices, staff, associates or customers to discuss wages and salary information, employee contact information, discipline, and other terms and conditions of employment. She could also reasonably interpret the email to prohibit heated discussions about the fairness of her disciplines and termination, the Respondent's dress code policy, or a myriad of other protected subjects.

In order to justify a prohibition against employees discussing terms and conditions of employment with other coworkers or people, the Respondent must show that it has a legitimate business justification. See *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011) (the Board held no legitimate and substantial justification when an employer promulgates a blanket prohibition against employees discussing matters under investigation). The question becomes whether the Respondent's stated legitimate and substantial business reasons outweigh the employees' exercise of their Section 7 rights. See also *Banner Estrella Medical Center*, 358 NLRB 809, 810 (2012) (the Board quoting from *Hyundai America Shipping Agency*, "Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden 'to first determine whether in any give[n] investigation witnesses need [ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up.'"). Id.

In this instance, the Respondent must show that sending the email was necessary because its staff, employees, associates and customers were in danger of being harassed or harmed by Orozco. McFadden testified that Castro and Smith's concerns and Orozco's comments about friends who "had her back" justified sending Orozco the email. I find, however, that the Respondent has not met its burden because it failed to present substantive evidence that those concerns were credible.

Although Castro testified "I'm not afraid of Ana, but I am a little bit in fear of what she's capable of doing," it is not relevant to the Respondent's alleged concerns. Castro admitted that she never voiced this concern to any of the Respondent's employees, including McFadden or Rehmke. Castro also alleged that Orozco's nonwork-related conversations were "disruptive" and "harassing" to her ability to do her work. (Tr. 166-167). Read within context, it is clear that Castro did not view these conversations as menacing or threatening, but rather as an annoyance. Further, after Orozco was terminated, Castro continued to be close friends with her and admitted she was not afraid of Orozco. Likewise, Smith testified that his complaint that Orozco was "disruptive" and "harassing" referred to his belief that she talked too much while he was trying to work. According to him, this made it more difficult to timely complete his work because she kept interrupting him to talk. Consequently, I find neither Castro's nor Smith's testimony would justify the Respondent sending Orozco the email at issue. Finally, Orozco's alleged comments that certain people who came into the Galesburg office were her friends and "had her back" if she needed them is too ambiguous and subject to different interpretations to justify violating her section 7 rights by threatening her with prosecution for discussing her terms and conditions of employment with other employees, customers, prospective customers, or the general public.

Accordingly, I find that the Respondent violated section 8(a)(1) of the Act as alleged in paragraph 4(e)(i)(ii) of the complaint.

E. Orozco's termination on June 27, 2014

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by terminating Orozco in retaliation for her engaging in protected concerted activities. Further, the General Counsel argues that the reasons given for Orozco's termination are pretextual. The Respondent counters that Orozco was not engaged in protected concerted activity be-

cause she was advocating solely by and on behalf of herself. Respondent further contends that even assuming Orozco's activity was of a protected concerted nature, it was unaware of it. The Respondent argues that, even assuming the General Counsel established its initial burden of proof, Orozco was discharged for nondiscriminatory reasons.

I find that the General Counsel has established that the termination of Orozco effective June 27 violated Section 8(a) (1) for the reasons discussed below.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[22] analysis to 8(a) (1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.,* supra; *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in concerted activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* supra 359 NLRB 355, 359. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue. In order to sustain its initial burden of proof, the General Counsel must first prove that Orozco engaged in concerted protected activity and it was the substantial or motivating factor in the Respondent's decision to discharge her. Upon such a showing, the Respondent then must present evidence that it would have terminated Orozco even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

[22] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

The evidence establishes that Orozco engaged in concerted activities when she discussed the discipline she received and the unfairness of the Respondent's dress code policy with coworkers. The counsel for the General Counsel correctly notes in its posthearing brief that the Board has consistently held that "an employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests." (GC Br. 26) See also, *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014) (explaining the "mutual aid or protection" analysis focuses on whether there is a connection between the activity "and matters concerning the workplace or employees' interests as employees.") Orozco engaged in such discussions when she asked Smith for his advice about the discipline she received on June 2. She also voiced to other coworkers those same concerns about the unfairness of her discipline and the disparate manner in which the Respondent issued discipline for violations of that policy. See *Fresh & Easy Neighborhood Market,* 358 NLRB 537 (2012); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658–659 (2007).

I also find that the evidence establishes the Respondent had knowledge of the concerted activity prior to terminating Orozco. McFadden notated in Orozco's July 21, 2013, performance appraisal that she was aware of Orozco sharing with coworkers work related discussions that they had which she wanted to remain between them. Credible testimony was introduced that months and days prior to her termination, Orozco complained to Castro, Smith, and Collins about the Respondent's dress code policy and the discipline she received on June 3 for violating the policy. About a week after June 3 Smith acknowledged that he told the Human Resources Manager, Chantelle Gregg, about Orozco's complaints about being disciplined and her issues with management. He also noted that he informed Gregg that Orozco said she was going to the company picnic and complain to President Hunsche and Regional Manager Ladd about her belief that she was being treated unfairly.

I find that Orozco's discussions with coworkers about her belief she was being disciplined unfairly and the dress code policy was being applied inconsistently constitutes protected concerted activity. I also find that the Respondent, through its managers and human resources staff, was aware of the protected activity prior to terminating her. Clearly discharging Orozco was an adverse employment action. The remaining question, therefore, is whether the Respondent terminated Orozco because of discriminatory animus.

Discriminatory animus can be inferred from both circumstantial and direct evidence. The Board considers several factors in determining whether an inference of discriminatory animus can be sustained. The factors to consider are proffering false reasons in defense of taking the adverse action, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and the proximity in time of the discipline to the protected activity. *Embassy Vaca-*

tion Resorts, 340 NLRB 846, 847 (2003); *Austal USA, LLC*, 356 NLRB 363, 363 (2010); *Lucky Club Co*, 360 NLRB No. 43 (2014); *Relco Locomotives*, supra.

I find that the Respondent's actions evince discriminatory animus when: Orozco was interrogated about her conversations with coworkers; she was chastised for sharing with coworkers her discussions with management; and she was instructed not to discuss terms and conditions of employment with coworkers. The evidence is undisputed that prior to terminating Orozco, Smith told Gregg that Orozco interrupted his work with excessive talking; and that she had informed him that she was going to elevate her complaints up the management hierarchy about being disciplined and issues with her managers. The evidence is also undisputed that Smith was told the information would be forwarded to McFadden. (136–139, 148) Moreover, the Respondent admits in its position statement that one of the reasons for Orozco's discharge was for her threat "to take action to get her managers discharged." (GC Exh. 8.) The Board has held that a judge may find that a factual assertion in a party's position statement is substantive evidence or an admission. See *United Scrap Metal, Inc*., 344 NLRB 467, 467-468 (2005); *Elyria Foundry Co*., 321 NLRB 1222, 1232-1233, and 1251 (1996), enfd. 205 F.3d 1341 (6th Cir. 2000).

I do not credit McFadden's testimony that only after Orozco's termination did she learn about Orozco's threats to complain to Hunsche and Ladd about her discipline. McFadden readily admitted that Gregg informed her of Smith's complaints about Orozco's excessive talking and the evidence has not been refuted that Gregg told Smith she would forward the information about Orozco's alleged threats to disrupt the picnic by complaining about her discipline. It seems to me that a known threat by an employee to disrupt a company picnic would be information more important for human resources to convey to the manager than a complaint that Orozco talked too much. Yet, McFadden would have me believe that despite the disparity in importance, Gregg conveyed the more minor infraction while neglecting to convey an alleged credible threat. This is especially significant considering McFadden's testimony that the staff was in fear of what Orozco might do after she was discharged because of comments she allegedly made in the past about activity at her family bar and people she knew that would "have her back."

As already noted in the decision, McFadden expressed displeasure with Orozco for talking with coworkers about their conversations on work related issues for months, weeks, and minutes prior to Orozco's discharge. Minutes before issuance of the termination letter, Rehmke reiterated that Orozco should not discuss problems that she has with managers with anyone but other managers. Further, Orozco was terminated within weeks of the Respondent's human resources manager learning of, and forwarding to, McFadden Orozco's threat to get her managers fired by complaining about them to Hunsche and Ladd at the company picnic.

I find that the General Counsel has established its initial burden of proof. Therefore, the Respondent must show that Orozco would have been terminated even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089.

The Respondent argues that it terminated Orozco because of her "unprofessionalism and disruptive behavior." (R. Br. 16.) According to the Respondent, Orozco was terminated for interrupting other employees work by excessively discussing personal matters and complaining, dress code violations, and threatening to make a scene at the company picnic to get her managers discharged. However, I find that the Respondent's purported reasons for Orozco's discharge are pretextual. The Respondent seized on a few trivial offenses committed by Orozco to effectuate its true purpose of discharging Orozco because of her concerted protected activity.

McFadden initially testified that she was the sole decision-maker regarding Orozco's discharge and one of the reasons for Orozco's termination was that she continued to violate the dress code policy.[23] The March 14, 2013, written warning issued to Orozco noted that if she violated the dress code policy again, she would be issued a final warning and subject to termination. Her second written warning for violating the dress code policy stated it was her final warning and "[a]dditional issues could result in termination." (GC Exh. 11) Although I agree that the first written warning was justified, the second warning was clearly unwarranted and a pretext for retaliating against her for engaging in protected concerted activities. The dress code explicitly allows for female employees to wear dress capris that are not tight to the leg or made of denim fabric. Similarly, the email that Rehmke sent notifying employees of the modified dress code for the golf event did not prohibit capris. My review of a picture of Orozco's pants shows that they are capris pants that clearly are not made from denim material, tight to the leg, or too short. (GC Exh. 18.) Even assuming that the pants were cargo pants as alleged by the Respondent, they were no more "unprofessional" for the outdoor golf event than the shorts Rehmke wore to work. Further, there is nothing in the written dress code policy or Rehmke's email prohibiting female employees from wearing camouflage patterned capris pants. The record is undisputed that Orozco's shirt and shoes complied with the dress code requirement for the golf event. Thus, her written warning was unwarranted and used to mask the Respondent's true discriminatory motive for terminating her. It is revealing that Collins and Berger also wore capris pants to the golf outing but were not disciplined. In fact, Berger wore sandals at the golf event that showed her tattoo in violation of the dress code policy. On another occasion Castro wore jeans to work without being disciplined, which was explicitly prohibited in the dress code. (GC Exh. 9, 20.) Consequently, the evidence is clear that Orozco was treated differently from similarly situated employees who had committed the same offense.

Second, the evidence establishes that other employees, including managers, socialized in the workplace without being disciplined. During working hours, McFadden sold products (Scentsy and Girl Scout cookies), and sent non-work-related emails to employees. Castro paid personal bills, ordered drug prescriptions, and held short telephone conversations with her husband while on company time. The Respondent does not

[23] McFadden inexplicably changed her testimony and claimed that she made the decision to terminate Orozco in collaboration with Rehmke. This is another example of her shifting defenses and evasive responses.

deny that other employees engaged in non-work-related conversations but argues that no one except Orozco talked excessively about personal matters while at work. I find, however, that this reason is a pretext for discriminatory retaliation. McFadden noted in Orozco's performance appraisal that some coworkers had complained about her interrupting their work by talking too much. In the same performance review, however, McFadden commented that Orozco performs well in her position and has only "minor things that need to be worked on." (GC Exh. 4.) This would seem to indicate that McFadden considered Orozco's socializing to be a "minor" issue. The second review that Orozco received was completed by Rehmke, who made numerous complimentary comments about her job performance, the high esteem coworkers and associates have for her, and her great attitude. Shortly after the performance appraisal, McFadden gave Orozco a pay raise for "outstanding performance and growth." (GC Exh. 5.) I do not find credible the Respondent's assertion that Orozco's "socializing" was so disruptive to the workplace that it warranted her termination. It is contradicted by the July 21, 2013 performance appraisal that deemed her socializing to be a "minor" issue, the November 20, 2013 performance appraisal that was replete with praise and high ratings, and a pay raise effective November 25, 2013, for "outstanding performance and growth." It is also telling that despite the supposed disruptive and harassing nature of Orozco's socializing she was never issued an official verbal or written warning or other discipline. Consequently, the Respondent tolerated this behavior from Orozco throughout her tenure and terminated her for it only after it learned of her protected concerted activity. This is a departure from its past practice of tolerating her socializing and further demonstrates animus. See *JAMCO*, 294 NLRB 896, 905 (1989) (clear departure from past practice evidence of discriminatory motive); *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014) (citing *Approved Electric*, 356 NLRB 238, 240 (2010)).

As previously noted, the position statement submitted on behalf of the Respondent by its attorney admitted that a reason for Orozco's termination was because she threatened to "take action to get her managers discharged." (GC Exh. 8.) I have already found that voicing her intentions to inform upper management that she had been unfairly disciplined by local management is a protected concerted activity. Therefore, the Respondent's admission supports a violation of the Act.

The termination letter issued to Orozco also lists, in addition to the dress code violation, attitude and negativity to staff and corporate representatives. I have already pointed out that in her most recent performance appraisal, Rehmke noted that Orozco's coworkers and associates held her in high regard which lays bare the fallacy of using "negativity" as a basis for termination. Further, discharging an employee for "attitude" without more specificity frequently runs afoul of the Act. The Board critically reviews such action because it often masks an employer's attempt to discipline or terminate an employee because the employee engaged in protected concerted activity. See *Citizens Investment Services Corp*., 342 NLRB 316, 328 (2004), enfd. 430 F.3d 1195 (D.C. Cir. 2005) (taking an adverse action against an employee because of "attitude" can belie the employer's discriminatory motive); *Boddy Construction Co*., 338 NLRB (2003) (the Board noted, "employer complaints about 'bad attitude' are often euphemisms for prounion sentiments, particularly when there is no alternative explanation for the perceived 'attitude' problem." Id., citing *James Julian, Inc. of Delaware*, 325 NLRB 1109 (1998)). The Respondent has failed to articulate, with specificity, the nature of Orozco's "attitude" and why it warrants the most severe form of workplace punishment, termination. Terminating Orozco for "attitude" is especially perplexing in light of the praise heaped on her a few months earlier noting her willingness to assist the office in whatever manner needed, her wonderful attitude, the high regards coworkers have for her, and the pay increase she received for "outstanding performance and growth." (GC Exh. 4, 5, 25)

Accordingly, I find that the Respondent violated section 8(a)(1) of the Act as alleged in paragraph 4(b) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Unique Personnel Consultants, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent violated Section 8(a)(1);

(a)Terminating Orozco on June 27, 2014

(b) Interrogating employees about their protected activities

(c) Directing employees not to discuss their terms and conditions of employment with other employees, customers, prospective customers, or the general public

(d) Threatened employees with prosecution or legal action for discussing their terms and conditions of employment with other employees, customers, prospective customers, or the general public

3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee, Ana Orozco, must offer Ana Orozco reinstatement and make her whole for any loss of earnings and other benefits she suffered as a result of the discrimination against her from the date of the discrimination to the date of her reinstatement. Further, the Respondent must remove from its files (both official and unofficial) all references to the discharge of Ana Orozco.

Backpay because of the discriminatory discharge shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Respondent shall file a report with the Social Security

Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Ana Orozco for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

The Respondent having discriminatorily issued an email to its employee, Ana Orozco, threatening her with prosecution by local authorities or legal action for discussing her terms and conditions of employment with other employees, customers, or the general public must rescind the email and expunge it from Ana Orozco's personnel file and any other files maintained by the Respondent which contains the discriminatorily issued email.

The Respondent having discriminatorily sent a letter to the Knox County State's Attorney's Office and the Galesburg, Illinois Police Department must notify both in writing that it retracts its June 27, 2014, letter instructing employees to not engage in protected concerted activity or that it would contact the police to stop such protected activity.

Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Unique Personnel Consultants, Inc., Troy, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with prosecution or legal action for talking to other employees, customers, or the general public regarding their terms or conditions of employment.

(b) Discharging or otherwise discriminating against its employees in retaliation for their protected concerted activities.

(c) Interrogating its employees about their protected concerted activities.

(d) Instructing its employees not to talk to or discuss with other employees, customers, or the general public their terms and conditions of employment.

(e) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Ana Orozco full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, make Ana Orozco whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Ana Orozco, and within 3 days thereafter notify Ana Orozco in writing that this has been completed and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of the Board's Order rescind the email and expunge from Ana Orozco's personnel file and any other files maintained by the Respondent the email it issued to its employee, Ana Orozco, threatening her with prosecution by local authorities or legal action for discussing her terms and conditions of employment with other employees, customers, or the general public.

(f) Within 14 days from the date of the Board's Order retract, in writing, the letter it sent on June 27, 2014, to the Knox County State's Attorney's Office and the Galesburg, Illinois Police Department instructing employees to not engage in protected concerted activity or that it would contact the police to stop such protected activity.

(g) Within 14 days after service by the Region, post at its facility in Galesburg, Illinois, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 25 Sub-region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 28, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your discussions with employees.

YOU HAVE THE RIGHT to discuss wages, hours, and other terms and conditions of employment with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT instruct you not to speak to each other about terms and conditions of employment.

WE WILL NOT threaten you with prosecution or legal action for talking to other employees, customers or the general public regarding your wages, hours, and working conditions.

WE WILL NOT fire employees because they exercise their right to discuss wages, hours, and working conditions with other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Ana Orozco her job back along with her seniority and all other rights or privileges.

WE WILL pay Ana Orozco for the wages and other benefits she lost because we fired her.

WE WILL compensate Ana Orozco for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files all references to the discharge of Ana Orozco and WE WILL notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL send a letter to the Knox County's State's Attorney's Office and the Galesburg, Illinois Police Department rescinding our June 27, 2014 letter which threatened prosecution of Ana Orozco if she contacted our employees, customers, or the general public.

UNIQUE PERSONNEL CONSULTANTS, INC.

The Administrative Law Judge's decision can be found at – www.nlrb.gov/case/25–CA–132398 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.